The ANTITRUST BULLETIN

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INTRODUCTION

On May 26, 1955, the New York Patent Law Association, at a dinner in the Hotel Roosevelt following its Annual Meeting, heard two distinguished speakers upon the subject, "The Patent and Trade-Mark Aspects of the Report of the Attorney-General's National Committee to Study the Antitrust Laws." The first of these was Milton Handler, member of the New York bar and Professor of Law at Columbia University. The other was Laurence I. Wood, counsel for the General Electric Company.

It was the first authoritative discussion before our Association of the patent and trade-mark sections of the Report, which was issued March 31, 1955. While each of the speakers appeared in his individual capacity, and not as representing or on behalf of the Attorney General's National Committee, it should be pointed out that each participated in the deliberations of the Committee in which its conclusions on patent and trade-mark questions were formulated, and in drafting the pertinent sections of the Report.

An audience of some two hundred members was present. Seldom have speakers upon a complicated subject been heard by an audience as silent and intent as this one was. The storm of applause which followed each speech made it hard to tell which had commanded the greater interest.

W. Houston Kenyon, Jr.
Chairman, Committee on Meetings
New York Patent Law Association

AN EXAMINATION OF THE CHAPTER ON PATENT ANTI-TRUST PROBLEMS IN ATTORNEY GENERAL'S COMMITTEE REPORT

by

MILTON HANDLER*

Since the publication of the report of the Attorney General's National Committee to Study the Antitrust Laws, its members have been subjected to sharp personal attack and the report itself to extended criticism. One Congressman purports to see something sinister in the fact that this consultative body, possessing no governmental power whatever, included in its membership busy practitioners who have or do represent defendants in antitrust litigation. He compiled an honor roll in which he lists the matters handled by Committee members for antitrust defendants, the inference being the greater the experience the more complete the disqualification. I feel personally aggrieved since he credits me with only one of the many cases in which I have participated. I should think that the author of the laws against price discrimination would accord his free advertising on proportionately equal terms.

My assignment tonight is to discuss with you the chapter in the report dealing with patent-antitrust problems. The judicial assaults on the patent system in the late '30s and '40s are reminiscent of the hurricanes that pounded the eastern seaboard early last fall. By determining validity in accordance with the vague and elusive "flash of creative genius" standard, by injecting into the general patent law antitrust principles in the guise of unclean hands, by expanding the concept of patent misuse, by eliminating the estoppel between patentee and licensee where the license agreement contains a price-fixing stipulation, by invalidating customary license restrictions, and by obliterating the remedy of contributory infringement, the courts effected radical changes in doctrine, leaving this branch of the law in a state of turmoil. What this chapter purports to do is to put the pieces together into one cohesive whole, to place the older and newer rules in sharper and clearer focus, and to analyze and evaluate the more important rules in the field of patent-antitrust laws. Un-

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happily, the writing of this part of the report leaves much to be desired; the principles might have been formulated in the more precise terms. Nevertheless, the organization and analysis are clarifying and enlightening. They lift the fog of confusion that has overhung this area and bring understanding to difficult and perplexing issues. The principal contribution of the report is thus educational. The achievement can best be compared to the proper tuning and adjustment of a television screen so as to eliminate the snow, the distortion and the static. The resulting picture, though clear, may not be entirely to the viewer's liking.

The analysis commences with the acquisition of a patent by government grant or purchase. Neither method of acquisition presents any antitrust problem of serious dimension. As Judge Leahy pointed out in the *Cellophane* case,[1] it would be odd if the Government could challenge the legality under the antitrust laws of a monopoly which it has itself conferred on the patentee.

Aggregation of competing patents by purchase can, however, raise a question of monopolizing under Section 2 of the Sherman Act. This is a situation where two and two may add up to five. The union of several independently valid monopolies may result in an improper monopoly of an entire technology.

Assuming a lawful patent grant or purchase, need the patentee use the invention himself or license its use by others? It will be recalled that 15 years ago TNEC, after its study of the monopoly problem, advocated compulsory licensing on reasonable royalty. Legislation at various times has been proposed to forfeit patents which are not used. Neither proposal has ever been adopted by the Congress. Nor have the courts conditioned the validity of a patent on use or licensing. The Committee takes a middle course. It advocates neither compulsory licensing nor use. Nor does it uphold non-use regardless of the circumstances. Its position is that unreasonable non-use may constitute patent misuse and therefore be a bar to equitable relief. It may also have antitrust consequence if it has serious anti-competitive effects. It is extremely unlikely that non-use, standing by itself, would constitute a violation of the antitrust laws, but when

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[1] *U. S.* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 214 (D. Del. 1953), probable jurisdiction noted, 348 U. S. 806 (1954).

accompanied by other facts it may be an instrumental phase of the violation.

While licensing is not a prerequisite to the continued validity of the patent, it is clearly permissible. It is in the restrictions or limitations which the patentee imposes upon his licensee that the principal collisions between patent and antitrust laws have occurred. Almost every customary license stipulation has been under steady assault during recent years. The Temporary National Economic Committee recommended legislation requiring patentees to grant only unrestricted licenses and forbidding price, quantity, territorial or use restrictions. The penalty for restrictive licensing was to be the forfeiture of the patent. Congress has never acted upon these recommendations.

Price, quantity, territorial and use limitations are still valid under controlling decisions which have not been overturned, although the Supreme Court has been repeatedly requested to reject the *General Electric* rule[2] upholding price control in a single license between one patentee and one licensee. A majority of the Committee would permit restrictive licensing. It accepts as its classic yardstick the formulations in the *General Electric* case sustaining all restrictions which are "normally and reasonably adapted" to secure for the inventor the rewards to which the patent grant entitles him. In their view price, quantity, territorial and use limitations are valid. Some members of the Committee believe that control of prices by a patentee falls outside the proper scope of the pecuniary reward contemplated by the patent laws, and that use restrictions, sustained in the *General Talking Pictures* case,[3] particularly when applied to the ultimate purchaser, are contrary to the philosophy of the decisions forbidding vertical price control after the initial sale. There appears to have been virtually no dissent from the view that territorial restrictions are proper. The report is unclear as to the division of Committee opinion in respect of quantity restrictions. I presume that Committee members would line up on this issue very much the same as they do on price and use limitations.

The Committee recognizes that a tying restriction constitutes patent misuse, barring injunctive relief. It suggests no change in the

[2] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

[3] *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124 (1938).

Morton Salt doctrine.[4] However, it recommends that where a tying restriction is challenged under the antitrust laws, the economic power resulting from the patent be carefully appraised, and that it should not be conclusively presumed that the ownership of a patent necessarily confers an economic monopoly. Hence the majority feels that a tying restriction in the licensing or sale of patented goods is not *per se* unlawful under the antitrust laws; it is only unlawful under the rule of *Times-Picayune*[5] if the patentee possesses the degree of market power requisite to illegality. This part of the Committee's report has been misconstrued in one of the dissents. The Committee does not suggest that tying restriction should not constitute patent misuse; its recommendation relates solely to the application of the antitrust laws to tying restrictions in patent licenses.

On package licensing, the Committee draws a distinction between coercive "full line forcing" or "block booking" of patents, and the voluntary licensing of patents in a group for the convenience of the parties. It urges that package licensing should be prohibited only where there is refusal, after a request, to license less than the complete group. The Committee believes that as long as the patents are available on a "per piece" basis and there is no coercion to accept the entire package, it is not necessary that the royalty rates for each patent be justified on any proportional basis. The royalty rates, however, must not be so contrived as to circumvent the legal prohibition against coercive package licensing. The licensee must not be confronted with a Hobson's choice.

Thus far we have dealt with the provisions of a license between a single licensor and a single licensee which, however, may embrace more than one patent. Does the patentee lose his right to control price, quantity, territory and use when he issues identical multiple licenses? The decisions of the Supreme Court come perilously close to holding that a mere plurality of licenses, each containing the same restrictive provision, in itself violates the Sherman Act. But in the second *United States Gypsum Co.* case[6] the Court expressly disclaimed that it had held or was holding that mere multiple licensing

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[4] *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942).

[5] *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (1953).

[6] *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948).

contravened the antitrust laws. The question was left open. It is the Committee's view that if a license is valid when standing alone, it does not become invalid because like licenses are granted to others. Multiple licensing is not inherently unlawful. It is only where there is a conspiratorial agreement among the patentee and his licensees that the network of licenses becomes unlawful. Here again legality depends upon all the facts. Multiple licenses cannot be used as a cloak for price-fixing or other restraints of trade; when not so used and when issued individually by the patentee, without any concert among his licensees, the mere element of numbers does not convert an inherently lawful act into an antitrust transgression.

Assuming, then, that a patentee may issue a series of restrictive licenses to more than one licensee, does he run afoul of the antitrust laws if he accepts a cross-license of either a competing, comlementary or improvement patent from another patentee?

If all that is done is to exchange operating rights with or without payment of royalty, two discoveries or technologies may be fused into one indissoluble whole to the manifest benefit of the public. Cross-licensing, without more, by voluntary compact, is no different from compulsory licensing, with or without royalty, which the Government has consistently demanded in antitrust cases involving patents. Certainly the legality of a practice, which so clearly promotes competition, should not depend upon whether it is produced by voluntary agreement or by the compulsions of a decree. Likewise, cross-licensing, without more, brings about the very conditions sought by statutory compulsory licensing which the TNEC strongly recommended.

Suppose, however, the cross-licenses contain restrictive provisions respecting price, quantity, territory or use. It does not follow that because the restrictions are valid when inserted in individual or multiple licenses, they are equally lawful when reciprocally imposed as part of a cross-licensing arrangement by separate patent owners. An instructive analogy is found in covenants not to compete, where an agreement by a seller not to compete with his buyer or by a buyer not to compete with his seller, separately considered, may be entirely valid, but when mutually exchanged will be treated as an illicit apportionment of business. The law is clear that cross-licensing, with price, quantity, territory and use restrictions, is violative of the Sherman Act.

Suppose, however, there are no restrictions but each cross-licensee is granted the right to issue sublicenses, or some third person is appointed as a licensing agent. Is antitrust difficulty encountered if royalty rates are fixed by agreement or if royalties are divided on some pre-arranged basis? In the *Cracking Process* case,[7] the Supreme Court upheld cross-licensing with the fixation and division of royalties because the participants did not possess monopoly power, either of the patented methods of cracking gasoline or of gasoline itself. The Court's ruling rests on what I have called the concentric circle theory, namely, that the elimination of competition by horizontal agreement is permissible in the absence of monopoly power. The repudiation of this theory by the Supreme Court in other branches of antitrust law has materially weakened the authority of the *Cracking Process* decision. The fixing of royalty rates can be analogized to price-fixing, and the pooling and division of royalties to the pooling of profits, both of which have been repeatedly condemned. Nevertheless, the Supreme Court has never overturned or even expressly criticized this ruling. The implication of *Cracking Process* is that where the cross-license agreement embraces all of the patents in the field, or if the parties to the agreement account for most of the production in their industry, the compact becomes unlawful.

I personally have alway had serious questions concerning the legal soundness of the *Cracking Process* decision. The Committee, however, accepts *Cracking Process* and carries it one step further. It upholds cross-licensing, with the right to sublicense, even where there is monopoly power, provided the patent pool is open to all at reasonable royalties. Pools which do not possess monopoly power must likewise make their patents available to non-members unless each patentee participant retains the right to license his own patents. In other words, the Committee conditions the legality of these arrangements by groups with monopoly power by the same requirements of compulsory licensing at reasonable royalty which the Court would impose if the combination were held unlawful. This is a rather ingenious suggestion and one having considerable merit. I myself would favor the same requirement even where there is no monopoly either of patents or product in the defined field.

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7 *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163 (1931).

The report approves the doctrine of patent misuse initiated in the *Morton Salt* case; it believes, however, that the doctrine should extend only to those cases where the patent significantly contributes to the business practice which is challenged or is the instrument by which the monopoly is extended beyond its proper limits; it rejects the notion that contributory infringement itself should be deemed a patent misuse; it approves the changes effected by Section 271 of the new Patent Code; and finally proposes that patent misuse not be deemed a *per se* antitrust violation, but rather be visited with antitrust consequences only where it has serious anti-competitive effects. I analyzed Section 271 in a lecture I delivered before the Association of the Bar of the City of New York several years ago and then reached the conclusion, to which I adhere, that it is uncertain in its reach, ambiguous in its language, and dubious in its policy. I go along with most of the Committee's recommendations in this regard, but I would not favor weakening the *Mercoid* decision.[8]

The chapter then deals with remedies in antitrust cases involving patents. A majority of the Committee takes the view that the courts lack the power to order compulsory licensing without payment of royalty. A large minority believes that there is such power but that it should only be exercised as matter of discretion in the extreme case where less drastic remedies will not accomplish the purposes of the litigation.

Finally, without treating in any detail the cognate subject of trademarks and antitrust, the report urges the repeal of Section 33(b)(7) of the Lanham Act while preserving the right of the appropriate government agencies to proceed in any case in which a trademark is being used as an instrumentality for violating the antitrust laws.

From this sketchy and necessarily superficial summary, you can see that the report adopts a balanced view towards the relationship of patents and antitrust. It neither looks at patents with a jaundiced eye, nor regards the patent monopoly as something sacrosanct. It recognizes the possibility of conflict where the owner of a lawful patent monopoly encroaches upon areas reserved for free enterprise. The policy underlying antitrust is deemed dominant; patent law must

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[8] *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944).

conform to that overriding policy and the monopoly confined to the metes and bounds of the grant.

Reasonable men have differed and will differ on all of these issues. There will be many who will not agree with the Committee's views on restrictive licensing and patent interchanges. There will be many who will feel the Committee has gone too far in its approval of recent patent antitrust decisions. You will find, I believe, when this chapter is carefully studied, that the Committe has followed the middle road and that whether its views on policy be sound or unsound, it has added a measure of clarity to a field notorious for its obscurity.

THE PROBLEM OF PATENT INTERCHANGE AND THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE

by

LAURENCE I. WOOD*

INTERCHANGE OF PATENTS

The problem of the interchange of patents (which is the Report's substitute expression for the semantically inept patent pool) has long been one of the most interesting and most provocative of all antitrust problems. It has inherent in it issues involving all the intricate benefits of patent protection, the need for elimination of patent conflicts, and the freedom from the cross-prohibitions which prevent feasible patent use; yet, it also presents all the complications of cooperation between competitors (real or potential) and of the accumulations of strength and power through a multiplication of separately owned patent holdings.

If such an interchange is illicitly conceived, or if it engages in restrictive practices, the problem as to whether or not there is illegality is, of course, easily resolved. The major question which confronted the Committee in this area, therefore, was as to the propriety of an innocently contrived interchange which has a monopoly over the products or processes covered by the combined patents.

We concluded that such a showing should not constitute a violation of Section 2 of the Act. In the broad scope of our recommendations we have thereby admittedly moved beyond any existing Supreme Court pronouncements.[1] The Committee was unanimously of the view, however, that where such a monopoly results, the interchange should be required to license all applicants without discrimination and at reasonable royalties. This is essential to avoid placing nonparticipants at either a technological or a cost disadvantage, thereby further enhancing the position of the participants.

The Committee went on to recommend that even where a monopoly is absent, licenses should be made available to every applicant

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* Division Counsel, General Electric Company, New York City.

1 See *Baker-Commack Hosiery Mills* v. *Davis*, 181 F. (2d) 550, 568 (C. A. 4, 1950); *Cutler Laboratories*, 179 F. (2d) 80, 91 (9th Cir. 1949).

in any industry where the participants have surrendered their own right to license under the interchanged patents.

Thus, emphasis is turned away from the technical niceties of minute legal analysis which make anticipatory evaluation impossible, toward the easy yardstick of the availability of the interchanged patents. The primary inquiry into any patent interchange thus moves away from the question of whether there is a "monopoly," to that of whether there is a readiness to license all applicants. If that is present, the question of market dominance is academic.

Our thinking here was frankly pragmatic. If we assume a situation where an interchange is held to be illegal by a court, the most effective and equitable relief would be the ordered opening of the collected patents to all on a reasonable royalty, non-discriminatory basis. We have in effect recommended that the price which patent owners must pay for the privilege of assembling their individual monopolies into such a combination is the ready availability of those patents on a practical basis. This permits a lenient judicial attitude toward the interchange, and toward such questions as its justification, the technical need for it, and of its impact on the market—in exchange for a liberal reception by the interchange of non-participants. The price of the interchange of patents is, then, in effect, the surrender of the patentee's right of exclusion.

License Limitations

The Report reaffirms the validity of the traditional patent license limitations—whether of price, field of use, quantity or territory—so long as they are unencumbered by some extraneous or everweening plan or purpose of impropriety. There was substantial dissent only on the question of *price* limitations, where the majority recommended an approach following that of the *General Electric*[2] doctrine upholding these limitations as being "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."

However, the cautious phraseology of the entire section on limitations should make it abundantly apparent that there is nothing in the contemplation of the Committee which can minimize the fact that the imposition of such conditions in patent licenses can easily

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[2] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

serve as a very real focal point of antitrust concern and trouble for the patent owner.

The Report does expressly urge that multiple licenses containing such limitations be no less acceptable than a single license, so long as there is no finding of a conspiracy among the licensees (Pages 233, 241). To this extent the Report may be helpful in counteracting a misunderstanding evidenced in at least one recent lower court decision. See *Newburgh Moire* v. *Superior,* 105 F. S. 372 (D.N.J. 1952).

Misuse and Illegality

Perhaps the most clear-cut contribution made by the Report in the area of patents is in what may well prove to be a rather academic area—in drawing a line of demarcation between the "Misuse of Patent" doctrine and the violation of the antitrust laws.

The former grew up as an equitable doctrine denying relief to a patentee who used his patent to control the sale of unpatented materials—as by tying clauses or by marketing devices having an equivalent effect. The foreclosure of patent relief is automatic, coming instantly on a showing of extra-patent control.

The misuse doctrine was not in its inception equated to antitrust violation at all. Indeed, the Supreme Court early rejected the contention that a tying clause must, to constitute a misuse of the patent, be shown to be a restraint coming within the orbit of Section 3 of the Clayton Act—such a showing, of course, requiring proof of the competitive effect of the restraint.[3] The *Mercoid* cases went the opposite direction, however, and seem to hold that a misuse by extra-patent control is, without more, an antitrust violation—sufficient to support a claim for treble damages.[4]

Conceding that the self-same conduct may violate both sets of rules, the Report opposes the idea that all restrictive conduct outside the patent's scope (although it disqualifies patentee from relief) *must also* constitute antitrust transgression. To do so, it observes, would, in respect to the patent property, constitute a discriminatory rejection

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[3] *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488 (1942).

[4] *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.,* 320 U. S. 680, 684 (1944).

of antitrust standards and criteria, as evolved in the court interpretations of the several pertinent statutes.

For accurate emphasis on the validity of this distinction, it is important to stress the difference between a tying to a patent under a *license* (as through a refusal to license a combination patent unless one of the components is bought from the patentee) and a tying to a patented *article* in a lease or sale. In an antitrust inquiry into the tying to a patent, the strength of the patent is the only determination that needs to be made in looking for that all-important "market power." In the latter situation, involving a tying to a patented article, the patent may be of no moment at all in the competitive picture.

The courts, unfortunately, have not made clear their understanding of this all important distinction. The Supreme Court demonstrates this in its lengthy discussion of the tying clause problem in the *Times-Picayune* case,[5] by referring repeatedly to "patents" and "patented article" interchangeably. First, the basic rule: ". . . The essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."[6]

The Court then summarized the *International Salt Company* case,[7] saying that there ". . . leases of *patented machines* for dispensing industrial salt were conditioned on the lessees' purchase of the lessor's salt. . . . The patents on their face conferred monopolistic, albeit lawful, market control. . . ."[8] The Court went on to refer to ". . . other tying cases where" it said "patents or copyright supplied the requisite market control . . ."[9] and gave footnote emphasis to this by quoting from the *Standard Oil of California* case:[10] "A patent, . . . although in fact there may be many competing substitutes for the patented article, is at least *prima facie* evidence of (market) control." Thus, we have in this series of literary gleanings—

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5 *Times-Picayune Publishing Co.* v. *U. S.*, 345 U. S. 594 (1953).

6 *Id.* at p. 611.

7 *International Salt Company, Inc.* v. *U. S.*, 332 U. S. 392, 396 (1947).

8 345 U. S. 594, 608.

9 *Id.* at p. 611.

10 *Standard Oil of California* v. *U. S.*, 337 U. S. 293, 307 (1949).

coalesced into a single non-patent case—an indication that the Court has imposed on the owners of patented devices a much higher and more rigorous burden of conduct. The criterion as thus expressed is purely artificial and unsatisfactory, for the true distinction, in determining market control, should be whether or not there is in fact competition for the article, not on whether it is patented. There are indeed articles which are the subject of patent protection to the extent that they are essentially free from competition; there are many more, however, parts of which may be covered by one or more patents of minimal importance. Throughout industry there are probably few products not the subject of one patent or another, products which are in markets as competitive as may be. The matter of the strength of the lever is properly measured by the true competitive position of the tying factor. Where it is a patent itself which is the lever (as where a license to use the invention is conditioned on a purchase of some staple commodity), there is an understandable basis for saying that the evidenced desire to use the invention gives the patent a presumptive exclusivity which indicates dominance and leverage. But a patented *article*—a typewriter or a sewing machine or camera, or whatever it may be—may have within it one or more patented features which are desirable but which do not in any way remove the article itself from the forces of competition. Where this is so, it would seem absurd to take the position that the mere existence of patent protection within the article makes it automatically dominant.

It is this analysis and rationale which underlie the Committee's recommendation that "the patentee should be permitted to show that in the entire factual setting . . . the patent does not create the market power requisite to the illegality of the tying clause." (Page 238)

Basic Approach of the Patent Report

I should like in conclusion to refer briefly to some of the basic tenets of the Patent Section of the Report.

1. The Report broadly supports the fundamental legal rationale underlying the patent system, and its relationship to and basic consistency with the antitrust laws.
2. The Report broadly condemns all use of patents or patent agreements as tools of a conspiracy or combination in unreasonable restraint of trade.

3. In a few peripheral areas, the Report asks for a careful examination of the acceptability of specified practices, case by case, in line with the traditional Rule of Reason approach, looking at the public-interest purposes served by both sets of laws.

4. Finally, it should be emphasized that the Report undertakes no analysis of the *theoretical correctness* or actual soundness of the patent system as a means of *furthering invention and industrial progress.* We concluded that our assignment in this study was simply to *assume* that correctness and that soundness.

Accordingly, the Committee made the implicit request—which I am here willing to make express—that those who are in disagreement with the principles behind the patent system, and who believe that some other method of encouraging those objectives will function better, frankly so state their convictions, and oppose the patent grant openly, rather than seeking only by indirection and by judicial erosion its *ultimate destruction.*

HEARINGS BEFORE HOUSE ANTITRUST SUB-COMMITTEE: A PROGRESS REPORT

by

REP. EMANUEL CELLER, Chairman*

In my statement on May 10 opening the hearings on Emerging Monopoly Problems by the Antitrust Subcommittee of the House Committee on the Judiciary, I pointed out the six major reasons why our inquiry had been launched:

1. To probe deeply into the operation and enforcement of the antitrust laws at this time.

2. To assess the dimensions of, and generating forces behind, the current merger movement.

3. To study the adjustments in antitrust policy made necessary by new foreign economic policies here and abroad.

4. To secure up-to-date information from political, industrial, agricultural, and labor leaders concerning the new monopoly problems which they now face because of the new forces now transmuting the economy.

5. To provide a forum for the presentation, from all points of view, of recommendations concerning remedial measures whereby present antitrust laws might be flexibly adapted to preserve and promote strong, independent, growing, competitive enterprises.

6. To take inventory of the political and social dangers now involved in concentration of decision-making in the hands of giant aggregates of economic power. As Shakespeare stated in *Measure for Measure* "It is excellent to have a giant's strength; but it is tyrannous to use it like a giant."

On all these points the Antitrust Subcommittee had the privilege of listening to antitrust experts from every walk of life inside and outside the Government. Senator Estes Kefauver of Tennessee, Senator Joseph C. O'Mahoney of Wyoming, Senator Paul H. Douglas of Illinois, Senator Wayne Morse of Wyoming, and Congressman

* Democrat, New York.

Wright Patman of Texas, Congressman Henry S. Reuss of Wisconsin, and Congressman Abraham Multer of New York, gave generously of their counsel and knowledge derived from their rich experience in the antitrust field.

The Antitrust Subcommittee was likewise most fortunate in eliciting highly thoughtful and detailed presentations and recommendations from several of the nation's most eminent university specialists in antitrust matters, including such veterans of years of responsible service in the Antitrust Division and leading professors of law and economics as Prof. Louis B. Schwartz of the Law School of the University of Pennsylvania, Prof. Leonard J. Emmerglick of the School of Law of Georgetown University, Mr. Sigmund Timberg, for many years Chief of the Judgments and Judgment Enforcement Section of the Antitrust Division, Prof. Milton Handler of the Law School of Columbia University, Prof. Walter Adams of Michigan State and Prof. Eugene V. Rostow of the Yale Law School.

Witnesses were heard representing the Chamber of Commerce of the United States, the National Association of Manufacturers, important trade associations, leading farm and labor organizations, and many national retail and wholesale grocery, tire, petroleum, candy and druggist associations.

On the first of the six matters mentioned above, that of enforcement of the antitrust laws, the Antitrust Subcommittee received testimony from several witnesses, including Assistant Attorney General Barnes in charge of the Antitrust Division, Chairman Edward F. Howrey of the Federal Trade Commission, and, among several others, Prof. S. Chesterfield Oppenheim, Co-chairman of the Attorney General's Committee to Study the Antitrust Laws which in its Report on March 31, 1955 made no less than 73 suggestions of general guides or recommendations to enforcement agencies and the courts. Practically all of these were bitterly attacked by associations representing small business, farm, labor, retail and wholesale organizations, university professors, lawyers for private plaintiffs in antitrust cases—in fact by nearly every group except giant business organizations.

While more evidence and testimony is obviously necessary to determine which, if any, of these suggestions merit embodiment in actual policy, the hearings have already borne fruit: first, in apprising government agencies that many of these suggestions may contravene

the will and intent of the Congress, and secondly, in evoking increased support for measures, two of which I have introduced that have now passed the House, and are presently awaiting action by the Senate. These are H.R. 3659 raising the maximum fine for violation of the antitrust laws from $5,000 to $50,000 and H.R. 4954 permitting the government of the United States to recover as a party injured by antitrust violations and setting a uniform statute of limitation at four years in private antitrust cases. Senator Sparkman introduced a bill (S. 2075) that requires any corporation with assets over $1,000,000 to give 90 days notice to the Department of Justice and the Federal Trade Commission before consummating or being a party to a merger. Congressman Patman has introduced a bill (H.R. 6748) that not only requires advance notification but suspends a merger if a complaint is filed by the enforcement agencies.

Other bills have also been dropped in the hopper such as mine (H.R. 6404) reversing the Glenshaw decision taxing the entire amount of a treble damage recovery and Rep. Walters' (H.R. 4958) on the problem of triple damages. As more evidence is accumulated and digested no doubt other bills will be drafted, debated, and passed.

The testimony relative to the current wave of mergers, item 2 above, was voluminous. The Federal Trade Commission on May 20, 1955 brought out its *Report on Corporate Mergers and Acquisitions,* which documented such facts as that it is the large firms that are merging at present rather than the small and that two out of five acquisitions consist of "additional capacity to supply a market already supplied by the acquirer." In addition, Mr. George F. Mooney, Superintendent of Banks for the State of New York, Mr. Gidney, Comptroller of the Currency, and others gave extensive statistical documentation of the present day trend to mergers in the banking field.

Again there have been certain immediate results. In addition to the bills already mentioned strengthening the Celler-Kefauver Antimerger Act, there are several measures designed to apply the standards laid down in that Act to the entire field of industry and finance whether regulated by government or not. Such are H.R. 2115 that originated with the Federal Reserve Board and my bills (H.R. 6405 and 5948), the former amending the Federal Deposit Insurance Act, the latter the Celler Antimerger Act, both bringing bank mergers

within the orbit of the Clayton Act policy of keeping whatever free, independent profitably competitive enterprise we have wherever it is working effectively. To let a vigorous, independent unit swallow another like unto it in strength and competitive vigor is to sanction an economic cannibalism destructive of the American system of free, competitive enterprise.

Perhaps in no area do our antitrust laws require greater strengthening and modernization than in the field of foreign trade and foreign economic policy. It is here that better economic weapons are urgently needed wherewith to win the cold war on the economic front.

The evidence presented by Prof. Leonard J. Emmerglick, Thorsten Kalijarvi, Deputy Assistant Secretary of State for Economic Affairs, Sigmund Timberg and Eugene V. Rostow was most disturbing. In fact the testimony with respect to the Iranian Oil Consortium and the operations of the alleged international oil cartel revealed such jeopardy to the national security interests of this country that I announced the intention of the Antitrust Subcommittee to hold soon a complete investigation in this field. Such extensive international commercial agreements in practical effect constitute private treaties between American companies and foreign governments, which are undertaken and consummated without adequate control or supervision by duly constituted authorities of the United States Government.

Numerous recommendations were made concerning antitrust policy in the foreign economic field. Mr. Timberg advocated repeal of the Webb-Pomerene Act since the position of American firms in export markets no longer resembles that of 1918. He also suggested legislation reducing or removing the tariff protection on commodities produced or sold by firms found guilty of violating the antitrust laws. He urged implementation of the Thye amendment and together with Professor Rostow castigated the action which on April 4, 1955 terminated U. S. membership in the United Nations Ad Hoc Committee on Restrictive Business Practice. They pointed out that notions of extensive cartelism abroad are hang-overs of the fascist-nazi period and completely ignore the extensive liberalization of trade that has taken place under the aegis of the Marshall plan. Removal of fascist trade barriers and of war controls coupled with the inauguration of controls over cartels have created a new freedom of enterprise which

has been an important factor bringing West Germany, and Europe generally to an all-time high in prosperity.

The fourth item—current vexing monopoly problems—was dealt with by almost a score of witnesses from every field of commerce, industry, and labor. The gas station owners, the tire dealers, the wholesale grocers, the retail druggists, the cooperatives, small business men—all gave concrete and direct witness of their difficulties. In this connection Dr. Julian Caplan of San Francisco became the first expert to be heard in recent years whose practice covered representation of plaintiffs in private antitrust actions. From his decade of experience he gave the Antitrust Subcommittee extensive documentation concerning the plight of small West Coast steel fabricators who compete with subsidiaries or operating departments of large integrated steel producers but are dependent upon "Big Steel" for sheet or other semi-fabricated materials. His evidence taken from court records of cases settled in favor of the plaintiff both in and out of court showed coercion, intimidation, obstructive and discriminatory tactics in delivery of materials and even as condition of settlement in one case the brazen and, in my judgment, clearly illegal requirement that plaintiff bind his lawyers *not* to take on a single additional antitrust case for a period of five years!

The evidence here became crystal clear that there are hundreds of thousands of small business men and farmers who regard themselves as victims of monopoly practices. There seem to be a dozen or more areas here crying for intensive investigation. Senator Wayne Morse opened up a pandora's box of monopoly problems in the field of electric power. Senator Douglas highlighted the plight of the farmer squeezed between the upper mill-stone of higher prices for the things he buys, farm machinery, fertilizers and other finished goods,—and the lower mill-stone of declining prices for the things he sells. Such monopolistic price spreads and huge accumulations of corporate profits brought on the depression of 1929, he warned. Senator Kefauver, Congressman Patman and others called for intensive scrutiny of the impact of monopoloid enterprises and restrictive trade tactics upon retailers and wholesalers, notably of tires, gasoline, food, and drugs. Senator O'Mahoney showed how, despite explicit Congressional policy, no new entries had been certificated among the trunk airlines since 1938, the field being wholly preserved by the

Civil Aeronautics Board for 16 (due to mergers, now 13) "grandfather" carriers. Congressman Reuss suggested an exhaustive probe of the forces which manage to award some 30 billion dollars of government procurement contracts almost wholly to large firms despite heroic efforts and constant investigation by the Senate Small Business Committee and the Small Business Administration to get a fair share for small business. Congressman Multer advocated further examination of bank mergers. And so on.

Equally diverse and numerous were the recommendations (point 5 above) tentatively offered for study and action. The witnesses can be readily counted on the fingers of one hand, who testified with respect to the Attorney General's Report that all of the 12 recommendations for legislation and the 73 suggestions for enforcement be endorsed. More than 9 out of 10 witnesses dissented to a lesser or greater extent, primarily on the grounds of their conviction that the antitrust laws should be strengthened rather than weakened.

Many thoughtful and important substitute proposals were made to the Antitrust Subcommittee. So numerous were they in fact that only a small sample can be accorded space in this preliminary report. The subcommittee was urged to look into the pro's and con's of legislation, for example, which might prohibit companies of specified size from merging except upon advance approval based on a showing of technological necessity; or which might repeal the Reed-Bullwinkle bill; or repeal the McGuire Act; or amend the Motor Carrier Act to eliminate control of entry and rates for trucks and buses; or prohibit restrictive licensing of patents by large patentees. In addition, the Antitrust Subcommittee was urged, for example, to compile a list of the restraint of trade cases brought against the "100 largest" firms thereby identifying habitual offenders; to examine carefully a few leading patent pools; to conduct pilot studies of a few of the very largest industrial giants with a view to drawing up tentative reorganization plans that might limit such enterprises to activities geared in kind and volume to minimum technological requirements; to compile a who's who of megalolatry, that is of representatives and ideological fellow travellers of giant enterprises or their satellites who comprise the big business network in federal and state governments; and others of this genre.

The sixth and last reason for probing antitrust and monopoly problems, the fear that concentration of power in industry, in labor, and in agriculture may generate concentration of power in government, ran like a connecting thread through the testimony of nearly all witnesses. They repeatedly stressed the urgent need for full investigation of monopolistic trends and abuses to protect the country against the threat of unlimited agglomerations of private power of such proportions as to be inconsistent with the survival of genuine private enterprise or the successful functioning of democracy itself.

A highly interesting development in the hearings on this point was the emphasis on the need for tightening incorporation laws, and especially the revival of a proposal long advocated by Senator O'Mahoney that a national rule be established for national corporations. This proposal was made the subject of a special message by President Theodore Roosevelt, was endorsed by Presidents William Howard Taft and Woodrow Wilson, and has been urged by numerous experts on antitrust problems up to the present day. Of interest is the fact that the Twentieth Century Fund in its three volume study of cartels and competition puts first and foremost a proposal for federal incorporation.

Finally, the Hearings of our Antitrust Subcommittee re-emphasized that the basic goals of the American way of life are individual freedom first and foremost, then a system of justice establishing the zones of creative voluntarism within which a maximum of individual freedom can be obtained, and third, and least important, economic efficiency. It is not enough for big enterprise merely to be efficient. It must not limit freedom or generate injustice. Americans have repeatedly given heavily of their treasure to preserve their freedom. Vigorous enforcement of the antitrust laws that preserves small business and other recruiting centers for managerial skill and free enterprise is necessary for the preservation of democracy.

MERGERS AND THE ANTITRUST LAWS

by

GENERAL WILLIAM J. DONOVAN*

We are here to discuss mergers under the Antitrust Laws with particular reference to Section 7 of the Clayton Act.

Let me, at the outset, re-state my personal belief that competition is a basic conerstone of this nation. This is a belief I held as head of the Antitrust Division. It is a belief which, since that time, has been reinforced by my experience. In common with those who have studied our economy I agree that a controlled or monopolistic economy is incompatible with our liberties.

The broad purpose of our Antitrust Laws is to insure effective competition— Those contracts, combinations and conspiracies which seriously threaten such competition are prohibited. This does not mean, however, that the purpose of the Antitrust Laws is to shackle business to a horse-and-buggy economy. That this was not the purpose of these laws has been made clear by Congress and the Courts.

In enacting the Sherman Act, Congress had the foresight to express the policy of this law in broad general terms. As Mr. Chief Justice Hughes said in *Appalachian Coals, Inc.* v. *United States,*[1]

> ". . . As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. . . ."

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* Member of Donovan, Leisure, Newton & Irvine. An address before the Federal Bar Association, at the Federal Court House, Foley Square, New York City—May 25th, 1955.

General Donovan's address was followed by an impromptu talk by the Hon. Stanley N. Barnes, Assistant Attorney General, in charge of the Antitrust Division of the Department of Justice.

The Federal Bar Association (Empire State Chapter), Mollie Strum, President. The Antitrust Committee: Ernest S. Meyers, Chairman; Rudolph A. Correa, Floyd H. Crews, Manuel M. Gorman, Nicholas Kelley, Edward K. Kennedy, Richard B. O'Donnell, Harry G. Sklarsky, John F. Sonnett, James R. Withrow, Jr.

1 288 U. S. 344, 359-60 (1933).

The Antitrust Laws are not an end in themselves. Their enforcement is not a game to see how far these laws can be stretched to harass business or stop reasonable and normal business activity. Today, as in the past, we face the danger that the interpretation of the Antitrust Laws may become so inelastic and so full of the concept of *per se* illegality that our entire economy may suffer.

The history of the Antitrust Laws shows that attempts to confine American industry within arbitrary and rigid limits have failed. The Supreme Court tried it first. In the various *Freight Rate* cases[2] the Court stated that the language of the Sherman Act required the enjoining of every restraint of trade. This was carrying the *per se* approach to the ultimate extreme.

It was soon realized that this approach might wreck our economy. President Teddy Roosevelt recognized the threat. He urged corrective legislation. The Supreme Court was forced to retreat. It then adopted the Rule of Reason in the *Standard Oil* and *Tobacco* cases.[3]

The Rule of Reason became overnight a political football. It was urged by some that this rule was so indefinite that businessmen were not properly advised as to permissible conduct. Others asserted that the test of legality was so elastic as to permit combinations injurious to the public interest.

Congress attempted an exact enumeration of forbidden practices.

The Clayton and Federal Trade Commission Acts were passed—Section 7 of the Clayton Act forbade acquisitions of stock where the effect may be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition.[4] Strict application of this rule would have imposed an unnecessary and discriminatory burden upon certain segments of American industry. The Courts recognized and avoided this danger.

In the *International Shoe* case[5] the Supreme Court, in effect, adopted a Rule of Reason in Section 7 cases. Despite all manner of

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[2] *U. S.* v. *Trans Missouri Freight Assn.*, 166 U. S. 290 (1897) and *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505 (1898).

[3] *U. S.* v. *Standard Oil Company of New Jersey*, 221 U. S. 1 (1911) and *U. S.* v. *American Tobacco Co.*, 221 U. S. 106 (1911).

[4] 15 U. S. C. A. §18.

[5] *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930).

attack the Court has resisted the *per se* approach. While it has paid lip service at times to this idea, it has basically decreed that each case involving mergers or consolidations must be viewed on its own facts. How else could one reconcile the Supreme Court's opinions in the *Chicago Board of Trade* case,[6] the *Appalachian Coals* case,[7] and the *Columbia Steel* case[8] with such cases as *United States* v. *Socony-Vacuum Oil Co. Inc.*[9] and the *Standard Stations* case.[10]

But turning more specifically to our problem of mergers, we find two recent events quite significant. As I understand them, both the Federal Trade Commission Report of last Friday (May 20th, 1955) and the Report of the Attorney General's National Committee to Study the Antitrust Laws recognized that mergers of competing firms are not *per se* illegal.

Actually, as we shall see later, the authority of the *International Shoe* decision[11] still remains as the law of the land. The philosophy underlying this decision was intended by Congress to give meaning to the new Section 7. Mergers must be judged by the facts in each case. We must still look each time at the effect upon competition. It is not enough that competition be lessened. The merger must lessen competition "to such a degree . . . as will injuriously affect the public."

Having stated this basic premise, let us look briefly at American industry and business and consider the part which bigness plays.

What is the record of our largest corporations?[12] The majority of the companies included among the 100 largest of our day have attained their positions within the last several decades. They are for the most part companies that have started new industries or have transformed old ones to create or meet new consumer preferences. Their relative size and importance have constantly shifted. In most cases the corporate giants of yesterday have been ousted by younger

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6 *Board of Trade* v. *U. S.*, 246 U. S. 231 (1918).

7 *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344 (1933).

8 *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495 (1948).

9 310 U. S. 150 (1940).

10 *Standard Oil of California* v. *U. S.*, 337 U. S. 293 (1949).

11 *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930).

12 See: A. D. H. Kaplan, *Big Enterprise in a Competitive System* (1954).

and more vigorous competitors. There is no reason to believe that those now at the top can remain there any more than did their predecessors. Mergers or acquisitions, *alone,* have never kept any American corporation at the top in any line of trade.

These evidences of mobility of position among the 100 largest industrials do not accord with any general assumption that large-scale corporations enjoy secure entrenchment by virtue of their size. One of the bases for acceptance of the competitive system is that it provides incentives to growth and change with commensurate rewards to those who contribute most effectively to an advancing economy. That this is a true concept of the American economy is suggested in the continuing rise and decline among the giants of American industry. The nature and sources of the competitive pressures that may account for this constant change whether from large or small companies or from within or without established industry patterns are matters of individual industry inquiry.

The war years are filled with achievements by big business. During the early days of the Korean engagement it became apparent that our 2.36 inch rocket was next to useless against the heavy armor of enemy tanks. Our front line forces called for the more effective 3.5 rockets. Within a matter of days these rockets, together with new ammunition had been produced by big business and delivered to our men in action.

In today's world the defense demands of this country require this kind of ability to meet field conditions overnight. New weapons require assemblages of the skills of technical personnel. It is difficult to imagine some 10,000 small companies collaborating to produce an atom bomb. Yet 4 big companies operating in unison under the Manhattan project were able to produce such a bomb.

I have dwelt on this problem of bigness for only one reason—*it is the background against which mergers must be viewed*—not as a matter of law—but as a matter of fact. We must weigh the threat of corporate bigness against the record of American industrial achievement.

The United States as a matter of firm national policy believes in a society in which competition in business is fundamental.

Yet there are still broad areas of disagreement as to what constitutes necessary controls on the one side and what throttles dynamic

industry on the other. So in the everyday activities of the changing business world the merger problem is one which business has faced for many decades. Today this problem is receiving the focus of Antitrust attention.

Let us not forget from the outset that it is not the design of our Antitrust Laws to prevent all consolidations. Nor was it the intention of the 81st Congress (which passed the most recent amendment to Section 7 of the Clayton Act) that this amended section should have such a result.

Thus the House Report cited with approval the *International Shoe* case,[13] where International Shoe Company purchased the stock of the McElwain Co. The two companies were engaged in the shoe business but were not in direct and substantial competition. The test under then Section 7 was the lessening of competition between the two corporations. The Court rejected the harsh rule advocated and adopted by the Commission saying:

> "Mere acquisition by one corporation of the stock of a competitor even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.;*[14] that is to say, to such a degree as will injuriously affect the public." [15]

The House Committee's Report indicated that new Section 7 was intended to carry out the policy announced in the *International Shoe* case. The Congressional debates, particularly in the House of Representatives, leave no doubt that this was the Congressional intent. The amendment did not intend that mergers should be judged by the Sherman Act. Nor did it attempt to establish an inelastic, rigid *per se* rule which would prohibit all mergers wherever there was found insubstantial or indirect effect upon competition.

Many mergers are undertaken for legitimate purposes. To mention a few there are (1) those combinations which are the inevitable result of failures by corporations in the continuing competitive struggle; (2) those businesses which join merely (a) for the purpose of

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[13] *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930).

[14] 258 U. S. 346, 357 (1922).

[15] 280 U. S. 291, 298 (1930).

meeting the demands of a highly specialized production or (b) to attain a greater efficiency and more profitable methods of production ultimately inuring to the benefits of our consuming public; and (3) those other joinders which are necessary to enable struggling firms to fortify their positions against the vigors of more formidable rivals. These are certainly three legitimate reasons for consolidations which the law should be utilized to protect. The recent Federal Trade Commission Report lists others, including approval of the recent automobile mergers.[16]

There are other acquisitions which have no legitimate excuse. For example: Corporate mergers for monopolistic purposes are outside the law. Corporate mergers designed to eliminate or which have the probable effect of eliminating effective competition without cause are contrary to our public policies as laid down in the Sherman Act of 1890 and the Clayton Act which was enacted in 1914 and amended in 1950.

Somewhere between the two extremes of corporate mergers lies a broad zone as yet quite undefined by court decision.

Practically, the acquisition of a fading company cannot be said to affect competition substantially. The courts should face up to this problem squarely and grant an exemption from Section 7. Should the executives wait until a company is actually bankrupt before selling out, when a series of losing years show only mounting losses? Why should they not be allowed to sell out while the assets will bring a price? Of course they should. Neither the language nor the history of Section 7 requires the courts to condemn such mergers.

The merger problem under the Sherman Act is not difficult for we have the *Columbia Steel* case.[17] This case marked the latest attempt to use the Sherman Act as a weapon to prevent concentrations of economic power through merger.

The Supreme Court found that the acquisition was only "an appropriate business expansion by the Corporation." While the size of U. S. Steel was impressive, it declared that the "steel industry is also of impressive size and the welcome westward expansion of that

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16 Federal Trade Commission Report on Corporate Mergers and Acquisitions, Summary, May, 1955, p. 13.

17 *U. S. v. Columbia Steel Co.*, 334 U. S. 495 (1948).

industry requires that the existing companies go into production or abandon that market to other organizations." [18]

The Supreme Court made no distinction between U. S. Steel "going into production" by building new plants and buying out plants already in operation.

This decision led to the revision of Section 7 of the Clayton Act.

The issues which are normally raised in a merger case as tested by the Clayton Act, we find hidden in the phrase "where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." It is clear from the legislative history that the words "may be" were not intended to be "might be" or on the other hand "will be." Nor was mere possibility sufficient. The test was that of probability. The old phrase of "substantially to lessen competition" was given a new and fuller meaning under the amended section when Congress tried to make it clear that the established tests of *"per se"* and "quantitative substantiality" were not applicable. This section now appears to require a full inquiry into the relevant economic factors existing in the market at the time of the acquisition, with emphasis upon the word "relevant" so as to preclude economic data of no consequence.

Of course, an initial determination must be made by the court as to what is the relevant effective market in which to measure the element of competition both areawise and productwise which will vary greatly from industry to industry.

The Report to the Attorney General cites with considerable approval the Federal Trade Commission case of *In the Matter of Pillsbury, Inc.*[19]

In the *Pillsbury* case, hearings were held before the Trial Examiner who ruled that the evidence presented by Commission attorneys was insufficient to establish a *prima facie* case of illegality under Section 7. Of interest is the fact that the trial examiner had ruled out statistical evidence despite the fact it was the best evidence available. Upon appeal the Commission reviewed the proffered evidence as well as such other factual information physically in the record.

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[18] *Ibid.*, p. 533.

[19] F. T. C. Docket 6000 (1953).

The Commission held that Pillsbury's share of the market nationally as well as in the southern section of the nation was sufficient to establish a *prima facie* substantial lessening of competition. The Commission's ruling in reality purports to be a very comprehensive analysis of the purpose and intended effect of Section 7.

In an opinion written by Chairman Howrey, the Commission stated:

> "As we see it, amended Section 7 sought to reach the mergers embraced within its sphere in their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of *per se* violations. Somewhere in between is Section 7, which prohibits acts that 'may' happen in a particular market, that looks to 'a reasonable probability,' to 'substantial' economic consequences, to acts that 'tend' to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraints."

After remand to the Trial Examiner, further proceedings have not as yet resulted in any new ruling on the law. So no perceptible standards of determining the test of illegality have been finally adjudicated.

One should note that the Commission has gotten itself wound up in considerations of "oligopolistic or monopolistic competition" which are only substitutes for clear factual analysis and careful weighing of the facts. The vice in this approach is the assumption that effective competition cannot exist between several very large but independent corporations.

The Antitrust Division seems to be following the Federal Trade Commission's approach of *oligopolistic* competition in the theory of its case against Schenley Industries, Inc., filed in the United States District Court for Delaware in February of this year.[20] For in that case the government has carefully alleged the percentage position of Schenley in the market and also that of the acquired company, Park & Tilford. It then concludes with the allegation that "the addition of Park & Tilford's maximum annual capacity to the production of whiskey to that of the Big Four would increase the Big Four's capacity to 59% of the maximum annual industry capacity." No-

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[20] *U. S.* v. *Schenley Industries, Inc.*, Civ. 1686 (D. Del., Feb. 14, 1955).

where is it alleged that the Big Four have conspired to avoid competition.

In the *General Shoe* case[21] now pending in Tennessee the Department appears on the face of the complaint to rest its case solely on the acquisition of companies which may be in competition without regard to whether General Shoe Corporation or the acquired company has, in fact, any appreciable percentage of the trade in question. It is in this case, therefore, that we may expect a decision as to what constitutes the necessary amount of competition which must be affected in order for a finding to be made that "the merger may substantially affect competition." Without discussing the merits of this case it is safe to assume that the courts will wrestle with the problem of whether they will adopt a *per se* rule, or a modified rule of reason under which the competitive effect of the merger will be factually evaluated.

Conclusion

The legality of a merger is determined by numerous legal and economic questions of facts. The Honorable Stanley N. Barnes, recognized this when on April 11, 1955 he adopted the language of the Attorney General's Committee Report, by saying:

> "No one pattern of proof can meet the requirements of all cases. . . . Thus it will always be necessary to analyze the effect of the merger on relevant markets in sufficient detail . . . to permit a reasonable conclusion as to its probable economic effects."

Gentlemen, mere size, whether measured by combined capacity, number of employed personnel or capital valuation, does not meet the test of the Act unless accompanied by unlawful purpose, conduct or abuse.

In Section 7 Congress used words of broad general import. Like the language used in the Sherman Law, Congress did not go into detailed definition which might either work injury to legitimate enterprise or, through particularization, provide loopholes for escape. The interpretation of this law rests with the courts. They have been given ample authority to prevent any merger which substantially and adversely affects the public interest.

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21 *U. S.* v. *General Shoe Corp.*, Civ. 2001 (M. D. Tenn., March 29, 1955).

DIGEST OF THE CELLER HEARINGS*

(May 10–June 10, 1955)

The Antitrust Subcommittee of the House Judiciary Committee chairmaned by Rep. Emanuel Celler (D. N.Y.) launched its intensive study of antitrust and merger problems on May 10, 1955. The subcommittee members include Reps. Peter W. Rodino, Jr. (D. N.Y.), Byron G. Rogers, (D. Cal.), Sidney A. Fine, (D. N.Y.), Kenneth B. Keating, (R. N.Y.), William M. McCulloch, (R. Ohio) and Hugh Scott, (Pa.). The staff includes Herbert N. Maletz, Chief Counsel, Kenneth R. Harkins, Co-counsel, Thomas H. McGrail, Assistant Counsel, William W. Mulligan, Assistant Counsel and Theodore Krebs, Economic Consultant.

May 10

SEN. ESTES KEFAUVER (D. Tenn.): Attorney General's Report fails in purpose because it fails to analyze reasons for growing trend toward monopoly. He is worried by the failure of administrative agencies to enforce the laws, the usurpation of legislative authority by the courts and public indifference. The Report is unreal and out of touch with economic realities. The Rule of Reason has no place in the antitrust laws, yet the Committee recommends it be applied in the enforcement of all the trade regulation acts. The Report is criticized thusly: the major purposes and intended results were, "First, to inject the Rule of Reason into the entire structure of the antitrust laws; second, to impose standards of proof which would make virtually impossible the successful prosecution of a merger case under the amended Section 7 of the Clayton Act; third, to retain good faith as a complete defense to a charge of price discrimination not only in those circumstances to which it was limited by the Supreme Court, but to extend it to other circumstances as well; and fourth, to require or prove of conspiracy a type of evidence which can rarely if ever be obtained from the modern large corporation." He con-

* The digest was prepared by the staff of the Antitrust Bulletin and made possible through the cooperation of Bureau of National Affairs and Congressional Intelligence, Inc., both of Washington, D. C. The daily reporting of the Celler and Kilgore hearings are available from these organizations.

cluded, "These gentlemen came not to praise competition, they came to bury it."

REP. WRIGHT PATMAN (D. Tex): Enforcement of the Sherman Act is too much dependent on which political party is in power. Federal courts are not equipped to handle most antitrust cases satisfactorily because the judges do not have the training or the necessary staff help. Further, Sherman Act penalties are so small as to detract from the seriousness of the prosecution. Originally the Federal Trade Commission had been planned by Congress as a body to enforce trade regulatory statutes and be free of political interference. But today the FTC is inefficient and deficient, being just another executive agency under White House control. He recommends an anti-monopoly court which would hear all private antitrust litigation, initiate actions on its own motions, have members appointed for life, with decisions reviewable by the Supreme Court only as to questions involving "constitutional safeguards" and not as to matters involving economic fact and theory. A second recommendation was to frame antitrust laws so that enforcement would be primarily by private litigation; "while the watchdog over the public interest may sleep, the rivals in conflicts of private interest never sleep."

May 11

SEN. JOSEPH O'MAHONEY (D. Wyo.): Problems of agriculture and small business still remain unsolved. He pointed out instances of danger caused by increasing monopolization as: decreasing number of banks in the country and recent merger of Chase National Bank and Bank of the Manhattan Company; lack of competition in the airlines field as acquiesced in by the CAB and manifested by dominance of such lines as Pan-American and United and precarious position of the unscheduled airlines. The CAB, he said, had closed the door to new competition in the air carrier field. Government agencies were cooperating with big businesses to make them bigger; corporations were influential in determining who would be appointed to the commission which regulates the respective industries. The legislation which established these commissions should be reviewed. Except where it is beneficial for smaller companies, mergers should be prohibited. To enable Congress to keep control of interstate competition, which was leaking into the executive branch, corporations engaged

in interstate and foreign commerce should be chartered by some federal body rather than the states, which themselves cannot control the corporations because of the latter's extensive activities.

REP. HENRY REUSS (D. Wis.): The Attorney General Committee's Report is deficient in that it finds nothing to be alarmed about. It is too solicitous of the antitrust law violator and inattentive to the consumer and the small businessman. The Report was criticized on eight points: (1) recommendation that discretionary rather than of right treble damages be recoverable from antitrust law violators; (2) reduction in penalties for violating FTC orders; (3) stripping FTC of authority to impose quantity limits in cases where there are so few large scale purchases as to render quantity discounts unjustly discriminatory or promotive of monopoly; (4) recommendation that royalty-free licensing and dedication of patents never be used as a remedy in an antitrust case; (5) recommendation that dissolution, divorcement and divestiture be used sparingly and only where less drastic remedies will not accomplish the purpose of the litigation, such caution being unjustified by experience: (6) endorsement of various interpretations of the Robinson-Patman Act which are likely to seriously weaken the law of price discrimination; and (7) failure to recommend an increase in the criminal penalties under the Sherman Act from $5,000 to $50,000; (8) failure to recommend a vigorous enforcement of the Celler-Kefauver Act of 1950 as a means to halt the current trend in mergers. He went on to list other areas in which the Report should have made recommendations as: atomic energy, where the AEC is giving preferential treatment to dominant companies in the electric industry; television, where a few large networks and newspaper organizations are acquiring a stranglehold on the industry; airlines, where federal regulation has steadily promoted monopoly and not a single new airline carrier has been certified since the Civil Aeronautics Act was passed in 1938. As a last point, he criticized the Committee for failing to recommend that the government enter into an international treaty against cartel restraint and monopolistic practices.

May 12

HON. STANLEY N. BARNES (Asst. Attorney General): Judge Barnes objected to prior statements that members of the Attorney General's

Committee were predisposed to find favorably for large industries and against strengthening of the antitrust laws. The study was conducted by work groups of fluid and secret membership, and opinions were invited from federal agencies and any and all outside interested parties. To now identify the composition of the work groups or the draftsmen of their reports would identify men with views and would be unfair. He seemed to indicate that the major value of the Report lay in indicating areas where further legislative and private inquiry was needed to better the antitrust laws. On Section 7, he asked consideration for an amendment that would require pre-merger notification to the Department of Justice and the FTC, with certain exceptions and with regard for practicalities. Two other recommendations: The inclusion of the banking industry within Section 7 and the means to permit the Department of Justice to compel production of data before a complaint has been filed in a civil proceeding. He saw some potential danger in the number of recent bank mergers, but felt action could be taken where necessary under Section 7. He noted a lack of communication between his division and the Comptroller of the Currency. As to the use of percentage of production as a per se violation of the law, he was opposed to this procedure and would rather see a dollar value minimum. He reported the Department was watching developments in the Bethlehem-Youngstown matter; he pleaded security grounds for declining to comment on the Iranian Oil Consortium; he indicated study was being given to commissions paid by such groups as the New York Cotton Exchange and the Chicago Board of Trade.

PROF. WALTER ADAMS (Prof. of Economics, Michigan State Univ.): The Attorney General Committee's Report is too conservative, indicating that there is perhaps too much enforcement at present and "nowhere is there a suggestion that administration and enforcement be stepped up—that aggressive action be taken against the forces which tend to undermine our free enterprise system with the erosive powers of monopoly." Holds it unwise to increase Sherman Act penalties by only $5,000, and to restrict use of dissolution, divorcement and divestiture to only extreme cases. Also, he considered it unwise to bar royalty-free licensing and dedication of patents as remedies for antitrust violations; to condemn basing point systems only where they are shown as an outgrowth of conspiracy; to endorse

the *Standard Oil of Indiana* rule of good faith as a complete defense to price discrimination; to recommend scrapping of the Miller-Tydings and McGuire Acts without suggesting other means to avoid loss-leader selling. He condemned the "soft competition" policies of the ICC and CAB, noting the disastrous effects on expansion of railroads and airlines, and criticized the Report for failing to speak out against such practices.

May 13

SEN. PAUL H. DOUGLAS (D. Ill.): Urged a practical rule of competition: abuse of size ought to be restrained, so that success or failure in the competitive struggle may be, in fact, determined not by size, but by efficiency. "If the present high concentration of production now characteristic of so many lines continues, the result, as I have pointed out twenty years ago, in a book, *Controlling Depression,* is likely to be the generation of a cyclical downturn." One of the major causes of the Big Depression was the failure of industry, because of 'friction,' monopoly and quasi-monopoly, to reduce price commensurate with the reduction in costs so that undue profits piled up. Rigidity in prices were the result, he said, of mere big size, the widespread development of trade-marked and branded goods, price-fixing, prices agreements, and the growing power of monopolies, industrial combinations and trade associations. He found signs of such price rigidity in today's economy. New mergers and concentrations should be prohibited and existing concentrations reduced by exercise of the antitrust laws. He recommended that there be no future mergers without the consent of the Justice Department and the burden of proof should lie with the industries involved. He found no consistent governmental policy to combat monopoly, but only sporadic enforcement over the years. He favored repeal of the Fair Trade Act, termed N. R. A. the biggest economic mistake of the Roosevelt Administration.

HON. STANLEY N. BARNES (Asst. Attorney General): Returned to the stand for further examination on current action by the Justice Department. He stated a decision was made that action would not be brought against the *Washington Post* in its acquisition of the *Times-Herald* but would not reveal who made the decision. He

would not say whether a possible consent decree with AT&T would require the divestiture of Western Electric, but that it was being prepared for trial. There is no over-all investigation of the automobile industry, but the Justice Department had "eight matters" under study.

May 16

SEN. WAYNE MORSE (D. Ore.): Criticized the Attorney General Committee's Report for failing to consider problems affecting public utility regulations. He referred particularly to activities of Ebasco Services, Inc., which he stated was trying to gain control of the future development of power in the Columbia River Basin for private purposes. He went on at length in detailing the activities of Ebasco (Electric Bond And Share Company) Services in allegedly attempting to monopolize Northwest power development. He accused the CAB of acting as a "bouncer" for the 13 major airlines, and of being "the greatest drag on aviation since gravity."

THOMAS MCCONNELL (Chief legal adviser for Zenith Radio Corporation): Testified as to disagreement with the Attorney General Committee's Report, especially attacking the proposal to change the mandatory treble damage suit provisions.

SIGMUND TIMBERG (Washington attorney; former member of Justice Department's Antitrust Division): Testimony centered about six questions: this country's stake in an effective foreign antitrust policy; whether Sherman Act enforcement created difficulties for American foreign business that should be removed; are antitrust policies consistent with government's views on defense and foreign relations; whether Sherman Act is effectively enforced in foreign commerce: amendatory legislation to promote better enforcement; whether and what should be done to promote an anti-cartel policy in foreign countries. Five basic objectives of antitrust enforcement in the foreign field are that national interest is impaired when foreign cartels succeed in withholding vital materials from us, production and marketing arrangements impair willingness of American citizens to make foreign investments, removal of cartel barriers will aid American exporters, countries enmeshed in cartel restrictions that lower production and manipulate prices are less able to absorb

greater imports from the United States, and there are vital political reasons in having the economics of our free world allies function free of cartel production. He said these views were endorsed in the Thye and Benton Amendents to the Mutual Security Act. As to legislative recommendations, he suggested: repeal of the Webb-Pomerene Act, which authorizes American firms to combine in selling to cartels; the government should initiate an export credit and exchange transfer insurance program to aid the small exporter; legislation whereby an antitrust violator whose practices have excluded competition or raised prices and whose product is protected by a tariff, will lose the benefit of that tariff.

Ben H. Ryan (President of Independent Bankers Association of America): Mergers and consolidations should be stopped where the tendency is to reduce competition. The government must do the work because business cannot regulate itself. He was disturbed by the decreasing number of banks in the country, stating that the position of bank holding companies now is the same as that of public utility holding companies at the time Congress enacted regulatory measures for the latter group. The holding company practices in banking today are immune from state banking laws since the companies do not engage in banking but only control through stock ownership. Also banking holding companies can move across state lines and effect the equivalent of a merger while the individual banks could not. He asked that Congress outlaw holding companies and pass legislation to control bank mergers.

May 17

Roy M. Gidney (Comptroller of the Currency): He stated that his office considered proposed mergers on an individual basis, that mergers that have taken place are specifically permitted by law, and that his office tries to make its supervision "informed and constructive." He pointed out that in consolidation of national banks, approval of the Comptroller is required, but that a number of banks have left the national system, consolidate with state banks, and thus bypassed the requisite of approval. Mergers and consolidations approved by the Comptroller's office in recent years, he said, have not tended substantially to reduce competition or to create monopoly, and have been in strict compliance with the law, and have resulted in a

better banking system. He reviewed some of the general reasons causing banks to merge: difficulty in replacing top management; attractive offered price or terms; combination of small banks to meet competition of larger institutions; inability of smaller banks to meet borrowing needs of the community; loss of customers who merge with firms having banking ties outside the community; failure to compete on an aggressive and progressive basis; increased compensation and fringe benefits available from the absorbing bank.

ADOLPH BERLE (Professor of Law, Columbia University): Concentration is not a sign of "trouble" within the concentrated industries, he said, pointing out that two of the nation's major industries which are not concentrated are in "serious trouble"—the *coal* and *garment* industries. He blamed the government for the tremendous size of the television and radio broadcasting companies, and held it was a major factor in the aircraft industry, since it buys 90% of the industry's output. Government agencies also spur the concentration of industry in the fields of atomic energy and specialized electronics. He felt that "by and large" the antitrust laws have prevented the growth of monopolies, but said that the laws have not suppressed oligopolies which "we do not want to stop," and the government itself creates oligopolies when it seeks to aid an industry. He put himself in favor of the minority viewpoint in the Attorney General Committee's Report.

ADOLPH SCHIMMEL (Senior general counsel of Universal Pictures; chairman, law committee of the Motion Picture Association): He supports the Report recommendation to make imposition of treble damages discretionary in light of the experience of the motion picture industry over the past ten years, which showed: plaintiffs are given incentive to sue by mandatory treble damages; antitrust litigation has become "a form of prospecting for gold," with many attorneys taking such actions on a contingency basis; proof of damages has been easier for plaintiff and he is now able to compute damages on the success of wholly unrelated ventures.

May 18

HENRY BISON, JR. (Associate general counsel, National Association of Retail Grocers): He concentrated his remarks on the Robinson-

Patman Act and the provisions of the law relating to its enforcement. Referring to the Report in this connection, he objected to the Attorney General Committee's position that sections 2(d) and 2(e) of the act should be interpreted under the general injury standard of section 2(a). This was said to be an instance where the Committee sought to make an "interpretive reform" of the Act, whereas it was felt such change could only come by legislation. In criticizing detractors of the Robinson-Patman Act, he said it was incorrect to argue that the Sherman Act and the former were in conflict; that it is wrong to assume the public is injured only where there is a monopolization of trade. Equal injury can flow "where there is a wide variance between the size and financial power of competitors, the larger concerns can use predatory competitive methods to injure the ability of their smaller competitors to stay in business and compete. In other words, a method of competition fair among equals may be unfair if applied where there is inequality of resources. Answering other objections, he said there is a distinction between "price discriminations" and "price cuts". One of the clearest and most rewarding manifestations of competition at work, he felt, is price cuts, and if the Robinson-Patman Act prevented competition from asserting itself through price reductions to the consumer, it would be anti-competitive in effect. He struck out heavily against the Report suggestion of good faith as a defense under Robinson-Patman, too.

Watson Rogers (President, National Food Brokers Association): He said that "this Report containing allegations as deliriously false as these allegations regarding brokers, belongs in the waste basket, and not library shelves." Further, he felt adoption of the Committee's recommendation to make good faith meeting of competition an absolute defense to continual and persistent price discrimination as being just as dangerous as adoption of the Committee's recommendation to "emasculate" the prohibition in section 2(c) of the Robinson-Patman Act. Either one, he felt, would inevitably lead to a two-price system—one price for big coercive buyers and a higher price for the independents and smaller chains with whom they compete.

George H. Frates (Washington representative, National Association of Retail Druggists): As government protected the farmer and the airlines with subsidies and labor receives a minimum wage, he

saw nothing wrong with a statute, enacted by 45 states, that protects a manufacturer's trademark, good will and name by establishing a minimum floor retail price, particularly as Fair Trade is elective and the manufacturer's product is required to be in free and open competition with a product of similar character.

George J. Burger (Vice president, National Federation of Independent Business): In criticizing the Attorney General Committee's Report, he said his group found nothing that called for vigorous enforcement of the antitrust laws, nor did they find any recommendations for increased appropriations to the antitrust agencies, and particularly to the antitrust division of the Justice Department. His group was "amazed" to find what amounted to a recommendation that the Robinson-Patman "quantity limit proviso" be repealed, and it opposed such action. He concluded by urging that Congress investigate the FTC and its enforcement of various antitrust acts.

May 23

Loyd Wright (president, American Bar Association): He could not speak definitively on behalf of the A.B.A., that any stand taken must be approved by its House of Delegates, and that the A.B.A. would submit a report to the Congressional committee at a later date.

William D. Snow (General counsel, National Congress of Petroleum Retailers, Inc.): He charged that since Edward Howry has become chairman of the FTC no complaints or cease and desist orders have been issued involving practices in the petroleum industry. He said the country is divided into eight major marketing areas, and in each one petroleum company acts as price leader. With one exception, the Atlantic Oil Company, the price leaders are all members of the Standard Oil family—the "original Rockefeller group." The only "real competition" in the oil industry is at the retail level, he maintained, and said there was a clamoring among service station operators for relief through two suggestions—one, to establish the gasoline companies on "some kind of public utility status"; the other, to "divorce the major producers from retail distributors." His organization, it was pointed out, has not taken a position either for or against the Robinson-Patman Act.

BENJAMIN WERNE (Counsel for United Fresh Fruit and Vegetable Association): He stated that every conceivable device had been directed by large buying organizations in a concentrated effort to defeat Robinson-Patman and to restore the inbalance in our economy the act sought to correct. "If independent small businessmen . . . are to be encouraged, Congress must not insulate the big purchaser against economically feasible and equitable competition. Permitting the pseudo-brokerage and good faith defense, far from bringing the Robinson-Patman Act into harmony with the antitrust laws, as the Attorney General's Committee report advocates, can only serve to point the way to further and more ingenious circumvention." Turning to the Report's statements on organized labor, he agreed with the Report that labor has aimed at direct restraint on commercial transactions by practices which: fix the kind or amount of products that may be used; fix the market price of products; fix the geographical area in which products may be used, produced or sold; and fix the number of firms which may engage in the production or distribution of certain products. He asked that changes be made in labor legislation to eliminate such practices, pointing out that the Taft-Hartley Act did not. It was his view that labor is not excluded from the operation of the antitrust laws, so that Congress could take the actions deemed necessary.

ANGUS McDONALD (Assistant legislative secretary, National Farmers Union): He stated that the present Administration, "by one means or another, is nullifying and weakening the antitrust laws." He felt that the writers of the Attorney General Committee's report "favor a return to a system of discriminatory prices and unfair practices even though they weaken or destroy competition. While they insist that they want no conspiracy or coercive practices used, they seek to build a fence around per se practices and suggest that unless conspiracy can be proved, that any practice or system of practices should be legalized." He opposed adoption of the "good faith standard" by legislation and said, "allowing so-called big business competitors to meet so-called competition in good faith regardless of the effect on competition would destroy section 2(b) of the Robinson-Patman Act." As to the Report as a whole, his group found it "a thoroughly bad one. It will serve no good purpose. It is a handbook for antitrust violators and a document which will be relied on by those seeking excuses and permission to violate our laws."

R. H. Rowe (Vice president and secretary, United States Wholesale Grocers' Association): He felt the "quantity limit proviso" of the Robinson-Patman Act was vital and that it was a mistake for the Attorney General's Committee to suggest its abolition. He called the Committee's recommendation on the "brokerage provision" of Robinson-Patman "a concealed torpedo" that would destroy the act. It was said to mean "that the buyer can get brokerage or commission fees from the seller on the buyer's own purchases. This is now forbidden by section 2(e) and by a long line of court decisions." Legislative history was said to show that "the buyer can render no service to the seller that will justify payment of brokerage fees to the buyer on the buyer's own purchases," notwithstanding the "except for services rendered" clause found in the section.

May 24

Thosten V. Kalijarvi (Deputy assistant Secretary of State for Economic Affairs): The country has a direct concern with restrictive and cartel practices of foreign industries, he said. Cartels which fix foreign production quotas on materials which we require for our mutual defense effort, are obviously harmful; and a consumer price industry which keeps a price umbrella over inefficient producers to keep them alive interferes with efforts to increase the standard of living because it takes money out of the pockets of consumers and wage rates of employees are depressed because output, and therefore the demand for labor, is reduced. The State Department is in full agreement with the basic approach taken by Congress in the Thye Amendment and in the predecessor Benton Amendment. Two difficulties arise in carrying out the objectives of these amendments—business practices going back over many years have to be changed, so a gradual change only can be hoped for; we cannot interfere in the internal affairs of other sovereign nations. He said United States defense procurement abroad is being conducted wherever possible on a competitive-bidding basis, and that this is also being done by all NATO countries. He said the inclusion of a strong provision relating to cartels and economic concentration in the Schumann Plan Treaty was a "most dramatic development and a source of great hope for the advancement of the free competitive enterprise system." He stated that the State Department opposed current adoption of a

proposal by UNESCO for the creation of an international agreement or code governing restrictive business practices. It was suggested that before such a proposal could be adopted, more should be done by nations independently in the way of legislation and enforcement.

Prof. Leonard J. Emmerglick (Georgetown University Law School): The laws of competition are commonly thought to be summed up in the idea of the "survival of the fittest," he said, but far from accepting this biological principle as the law of the market, the Sherman Act's prohibition of monopolies and restraints of trade attempts to fit as many as possible to survive. That was the object of keeping markets free from monopolistic power, he said. Two major industrial areas of activity existed where enforcement of anti-trust laws was intimately connected to promoting the national security. Concentration of power into fewer hands in these areas, he said, meant that research activities would be curtailed. As to cartels, he said "International cartel arrangements, when on a sufficiently large scale, have very much the effect of private treaties. They recognize exclusive territories for each of the participants, usually in terms of national boundaries' fix the terms on which trade and commerce are to be conducted; set import and export quotas; and regulate prices. The national security then depends on treaties negotiated by private companies instead of those negotiated by the duly constituted representatives of the people." Of the pending case against an alleged petroleum cartel, he pointed out the effects of the alleged cartel had been an artificial regulation of the growth of our domestic industry. It had been pointed out that when the cartel companies about 1948 put Near East pipelines into operation and executed long-term contracts which directed where the crude oil should be sold, our foreign commerce in crude oil was "sharply reversed." "Until that time," he remarked, "the U. S. was a net exporter of crude petroleum. Very sharply after 1948 we became a net importer of crude petroleum, and this trend has been increasing." He noted that the National Petroleum Council was opposed to this development as an immediate danger to our domestic industry and as having effects on the national security. Should the Government win the case, a result might be greatly excessive imports of low cost oil into our market, but this condition could be met by tariff laws "applied by regularly constituted public authorities, looking only to the public interest," he said.

Howard Dresback (Chairman, legal and tax committee of the National Council of Farmer Cooperatives): He declared the association was "strongly opposed" to the suggestions of the Attorney General's Committee that farmer cooperatives should be given more stringent treatment under the antitrust laws and also the recommendations which would weaken the Robinson-Patman Act. Existing law and procedures for its enforcement in regard to agricultural cooperatives should be preserved, not restricted, and "should not be expanded by amendatory legislation." He said suggestions for restrictions made in the Report did not spell out how or why, and that the Report was incorrect in finding that farmer cooperatives were growing at a "jet-propelled" pace. Turning to the recommendation that responsibility for the enforcement of the antitrust laws be taken from the Secretary of Agriculture and placed elsewhere, he declared that the reason the Secretary had initiated no actions against farmer cooperatives "is that he has found no undue enhancement of prices of any agricultural commodity to suggest action by him under the law." The group he represented also opposes recommendations for legislative changes which would weaken Robinson-Patman by legalizing as brokerage allowances discounts which would be for the rendering of a bona fide brokerage service.

Jerry Voorhis (Executive Director, Cooperative League of the United States): He felt economic freedom was being "strangled by the cancer of sheer bigness," that "corporate bigness and bigness of concentrated control over capital is in itself a danger to continued freedom." His principal criticism of the Attorney General Committee's Report was that it dealt with small details and largely neglected the alarming development of concentration of economic control in the economy and the corresponding threat to economic liberty which should have been its main concern. He said "more than three times as many mergers have been engineered in each of the past three years as took place in the average year during the previous two decades. We do not find the majority of the committee even worried over the fact. . . ." More than spot enforcement was needed, he said, and fines were too small to act as a deterrent. He said the Committee should have proposed "a battery of measures to be taken with all vigor," including: (1) provision for adequate staff and adequate funds to fully enforce the antitrust laws; (2) specific exemption of

the first $50,000 or $100,000 of corporate earnings from income tax and more graduation of the tax rate thereafter; (3) encouragement of cooperative research facilities to serve small business and of cooperative advertising and marketing of small business products; (4) antitrust law amendment to bring entry of a corporation operating in one line of business into other lines under scrutiny and perhaps to make possible action to require divestiture of interest in cases where competition is threatened by such action; (5) consideration of a proposal to require federal licensing of corporations, "along with which could go a declaration that when a corporation had achieved a certain degree of dominance in an industry it becomes thereby affected with a public interest and subject to having representatives of the public appointed to its board of directors; (6) inclusions of banks under portions of the antitrust laws recommended by the Assistant Attorney General and passage of the Spence Bill affecting bank holding companies; (7) encouragement without favoritism or subsidy of the formation of cooperative and mutual-type businesses.

May 25

HOYT P. STEELE (President, Benjamin Electric Company): He offered the view that a single producer of a product in a given field, such as Alcoa in the aluminum manufacturing field, was not necessarily monopolistic, provided that product was in competition with other products which could do a similar function. In the example of Alcoa and aluminum, the other products would be the other commercial metals. Continuing this thesis, the witness appeared to feel that true monopolism by a business would require that the business control not only its own industry but other competing industries. Thus, he felt it would be incorrect to legislate controls on the size of a business or the proportion of an industry controlled by one firm. He declared that mergers since 1940 have rarely involved the bigger companies, that the recent mergers "have been the efforts of smaller companies to strengthen their competitive positions . . . and to diversify their products, and as a consequence the tax gains which may be achieved through merger. These acquisitions have produced greater percentage increases in the assets of smaller firms than of larger firms. This would suggest that competition has been increased,

not restricted, through a weakening of the relative position of industry leaders." He said it was wrong to think that big businesses grow at the expense of small businesses, for the latter possess flexibilities for many purposes that the industrial giants "can never match." He suggested antitrust policy rely on the fundamental objectives which competitive private enterprise provides: (1) introduction of new and improved products; (2) introduction of new and improved methods of producing established products; (3) benefits to consumers from cost and price reductions and new products; (4) freedom of access to a market for new and improved products; (5) freedom to develop and use more efficient production methods; (6) a tendency for businessmen to seek increased production, not restricted production, as a means of maximizing total profits. As to regulation, there should be investigations to determine why an industry is not measuring up to the standards of competitive enterprise, where such cases arise, and outright price fixing, boycotts, conspiracies to divide markets or control output restrictions should not be permitted. But individual cases which are not so clear-cut must be decided by the "rule of reason" flexibly applied. He continued, certain labor practices should be outlawed by legislation. Among these were: "Excessive concentration and misuse of economic power; certain types of payments to labor organizations; interference with use of installation of materials; 'featherbedding' practices; and secondary boycotts." The "antitrust immunity" established by the Clayton and Norris-LaGuardia Acts was "undesirable," he added, and was not "justifiable in the light of the very substantial statutory protections which unions enjoy in the field of labor law itself." He suggested that application of antitrust laws to labor unions would not restrict legitimate activities of unions, and that regulatory legislation should "specify clearly in the antitrust law provisions the legitimate activities of organizing and collective bargaining which are *not* to be affected, and to state clearly which are the trade restraints and monopolistic practices which *are* to be prohibited." He appeared as a spokesman for the United States Chamber of Commerce.

Julian Caplan (San Francisco attorney): He said a weakening of the antitrust laws by "making the award of treble damages discretionary would be a very serious impairment of the meagre arsenal of weapons available in the fight against monopoly." In his opinion, the

possibility of being eventually called to account by private litigants in triple damage actions "is a very wholesome and potent factor in deterring violation of the antitrust laws."

W. E. HAMILTON (Director of Research, American Farm Bureau Federation): Addressing his attention to fair trade legislation, he said his group was opposed to all forms of price-fixing; however, the non-signor clause of the McGuire Act was a particularly undesirable form of price-fixing because it provides a means whereby a minority of the distributors of a product can take action which is binding on the majority. The group favors antitrust action to prohibit predatory price-cutting, but saw difficulty in separating price policies that are designed to destroy competition from policies that actually reflect competition at work. Turning to the Attorney General Committee's Report sections on labor unions, he indicated his group favored these steps: (1) unions undertaking to fix prices, control production, prevent the adoption of technological improvement, or restrict sales territories or outlets shall be subject to antitrust legislation; (2) provisions of labor contracts which prohibit the adoption of new methods or require payment for work that is not done or not desired by the management should be declared to be contrary to public policy; (3) the prohibitions against secondary boycotts should be strengthened and vigorously enforced; (4) industry-wide and area-wide bargaining should be prohibited.

CLARENCE M. MCMILLAN (Executive Secretary, National Candy Wholesalers Association, Inc.): Referring to price discrimination, he said his group favored the Committee view that "analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to individual businessmen"; however, predatory price cutting designed to eliminate a smaller competitor from the market was deleterious and would tend to ultimately eliminate all competition in a market. He spoke strongly in favor of the Robinson-Patman Act, suggesting some weaknesses that should be removed and urging stronger enforcement. In criticism of the Report, he suggested the Committee should have recommended methods of eliminating the secretiveness of discounts and allowances such as is proposed by Rep. Patman's H. R. 567, feeling that putting a spotlight on discriminatory practices would act as a deterrent. "It would make the seller stop and think twice before he established a precedent for a

practice which he could not extend to his total operations." He criticized the Report further for failing to suggest means to strengthen Robinson-Patman rules. It seemed, instead, "the report would strengthen the position of those who feel that competition to be free, must give the seller the right to discriminate between buyers, regardless of the effect on competition."

Maurice Mermy (Director, Bureau of Education on Fair Trade): Repeal of the fair trade laws, he said, would arbitrarily impose destructive "self-competition" upon trade-marked national brands. He charged the fair trade section of the Report is "in effect, a public opinion poll of a highly selected but small group of persons," pointing out that the Committee heard no witnesses and "made no fresh, independent studies of their own." Expanding on earlier remarks, he said imposing self-competition on trade-marked products leads to persistent price-cutting on the products, which injures the property value of the trade-mark that the manufacturer still owns, and injures as well the small businessman." He noted that the above practice tends to concentrate sales of the product in a very few hands, that the "goods are cheapened in the public estimation on account of the fluctuating prices," and that fair trade "has no scientifically demonstrated adverse effect on consumers."

June 6

Earl Bunting (Honorary vice president and former President, National Association of Manufacturers): The government, he declared, should not attempt through the antitrust laws, "to supervise business decisions on whether to grow or not to grow." He quoted figures purporting to show that big businesses do not dominate the American economy. "Of the 100 largest corporations in 1909, 64 had vanished from a list of 100 largest corporations by 1948. . . . Between 1939 and 1946, the 200 largest corporations increased their assets by 50 percent, while the 800 smaller corporations increased their assets by over 100 percent.". . . No matter what criterion is used the results are consistent; during World War II both large and small manufacturing corporations grew substantially, but the smaller corporations grew faster than the larger ones," he stated. He suggested that these principles be applied in enforcement of the antitrust

laws: "(1) The form of competition which has developed in any field should be judged on the basis of its practical operation, and should not be judged on the basis of artificial and unattainable theories of 'perfect competition.' (2) Business growth attained through productive efficiency and aggressive marketing practices is normal in a free competitive economy, and should not, in and of itself, be regarded as 'monopolizing' or 'attempting to monopolize.' (3) Identity of prices of similarity, of pricing practices, and of price movements should be recognized as among the natural results of competition. They should not be interpreted, in themselves, as evidences of actual collusion or as the practical equivalent of collusion." He said the N.A.M. urges that "applicable federal laws be amended to assure the freedom of the individual seller to meet price and other forms of competition. The individual seller should have the right, in selling his products, to determine independently the pricing methods which he believes economically sound and desirable, delivered or otherwise, whether or not such pricing methods are used by a competitor or competitors." As to restrictions on labor, he suggested the powers of international unions be curtailed by legislation and that industry-wide bargaining and industry-wide strikes also be dealt with. Turning to the recent FTC report on mergers, he said he would question the results, and suggested that those who had compiled the report had resorted to "statistical trickery" in "oversimplifying" the picture. Finally, he favored legislation which "would spell out in detail" the circumstances covered by section 7 of the Clayton Act, and a codification of antitrust and antimerger offenses.

Winston W. Marsh (Executive Secretary, National Association of Independent Tire Dealers, Inc.): He said the Attorney General's Report, as a whole, would tend to greatly weaken the present antitrust laws in such a way as to jeopardize the very foundation of small business by eliminating most of the rules of fair play which have evolved over the years. His association is opposed to the portion of the Report which approves the doctrine that good faith is a complete defense to a charge of price discrimination when a seller shows that his lower price was made in good faith to meet an equally low price of a competitor.

June 7

REP. ABRAHAM J. MULTER (D-N.Y.): Devoting himself to the matter of bank mergers, he said he believed the records would show that not one merger had been disapproved, and suggested the law should be strengthened. Unless bank mergers are stopped, he predicted the nation will get to the point like England where the Bank of England was nationalized. He recognized that bank mergers cannot be stopped by legislation, but urged the law be made more specific, and the agencies which now rest on their discretionary authority and say mergers are not lessening competition should have the lines spelled out for them. While not opposed to branch banking, he decried the merger movement for drastically altering our banking structure by wiping out many strong, ably managed, local, independent banks.

PROF. S. CHESTERFIELD OPPENHEIM (University of Michigan Law School): He testified mainly in defense of the way in which dissenting opinions in the Attorney General's Report had been handled. The witness asserted that in instances where dissenting remarks had had to be condensed or summarized, advance approval for the changes had been secured from the persons involved.

PROF. EUGENE V. ROSTOW (Yale Law School): He said the Report accomplished four ends: (1) it constituted the first major analytical restatement and survey of the antitrust laws as whole; (2) contained certain recommendations for legislative change; (3) pointed out the need for a broader study of certain topics; and (4) by failing to deal with certain topics, to direct attention to them. The most important fact about the Report, he felt, was that it proposes no change in the Sherman Act or its fundamental interpretation.

June 8

GEORGE A. MOONEY (Superintendent of Banks of the State of New York): He was in favor of the Celler Antimerger Act of 1950, to prohibit corporate mergers where the effect might be substantially to lessen competition or to tend to monopoly. In connection with the approval or disapproval of proposed bank mergers, he indicated he used three yardsticks: (1) concentration of assets and banking power; (2) the public interest; and (3) the free enterprise system.

He told the subcommittee that although his office did not have jurisdiction over enforcement of federal antitrust statutes, when the recent mergers of Chase and Manhattan and Public National and Bankers Trust came into his office, he referred the proposals to the Justice Department and the New York State Attorney General for advice and comment. He noted that the Chase-Manhattan merger had not lessened competition because Manhattan specialized in neighborhood branches, while Chase concentrated on large corporate loans. Therefore, he said, broadened service resulted.

ANDREW J. BIEMILLER (National Legislative Committeeman of the American Federation of Labor): While the Attorney General's Report, he said, had not recommended extension of the antitrust laws to cover union activities, the Report has served as a signal for anti-union employers and associations to raise the cry to put unions under these statutes. He presented four reasons why this should not be done: (1) such a suggestion forgets "bitter pages of American history" which show use of antitrust laws to suppress legitimate union activity; (2) labor unions are fundamentally different from business organizations and cannot be treated in the same way for purposes of antitrust legislation; (3) the labor movement cannot be considered monopolistic, even though union organization has increased in the past 20 years, and the growth raised no threat to our free competitive system; (4) the abuses of which anti-union employers complain are either already the subject of Congressional regulation or are not actually significant abuses. He noted that organized labor is not centrally controlled in this country, that various unions act independently and control their own finances, and that the merger of the A.F. of L. and the C.I.O. will not mean centralized operation. As to the usual six "abuses" of labor complained of by businessmen (secondary boycotts; hiring of unnecessary labor; jurisdictional disputes; price fixing and control of the market; opposition to technological improvement; and industry-wide bargaining), he said the first three are controlled by the Taft-Hartley Act, labor does not condone the fourth; the fifth involves only a minute number of instances; and the sixth does not really exist at all, except possibly in the wallpaper industry where the companies asked the unions to bargain on that basis.

ROBERT NATHAN (Americans for Democratic Action): For his group he filed a statement which opposed circumstances which

permit the exercise of monopolistic control and centralized authority, and that it is better that control be exercised by democratically elected officials rather than by private individuals whose economic means have permitted them to achieve such control. He made these contentions: established business interests do not support anti-monopoly measures; concentration of economic power means concentration of political power; effective free entry of new enterprises are essential to competition; free competitive enterprise is preferred over regulated monopoly; government regulation of the airlines has been mishandled and monopoly encouraged; radio and television are monopoly-ridden; many government procurement policies often encourage monopoly; penalties for violation of the antitrust laws are too mild; loss of competition has curtailed price flexibility; and he urged that the subcommittee look into the situation where insurance companies and mutual funds wield great influence through their investment power. He also suggested that the current Administration has affected the technical level of antitrust enforcement by firing several times as many economists as it had hired. As to recommended legislation, he suggested that if one company controls as much as 20% of the market, it should have to demonstate that it is not hurting the industry. He accused the CAB, ICC, and FPC of failing to stimulate competition in their respective areas.

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Prof. S. Chesterfield Oppenheim (University of Michigan Law School): He testified primarily on the means by which the composition of the Attorney General's Committee was determined. He indicated that three criteria were applied to find persons: (1) who would be guided by the broadest viewpoint of what is best for the American economy rather than what benefits might accrue to any particular industry, specific business, or any individual's reputation; (2) having specific knowledge and experience in the antitrust field; and (3) who were representative of interacting viewpoints on controversial antitrust policy issues. Turning to the Report itself, he said the Committee had adopted the rule of reason of the Sherman Act and had espoused a rule of reason for certain parts of the Robinson-Patman Act, as well as for sections 3 and 7 of the Clayton Act. His position is that the rule of reason should not apply to price-

fixing agreements, and that a "rule of reason approach" should also be applied to the Celler Anti-Merger Act. Asked if he favored having certainty in antitrust statutes, he said he did not believe in any illusion of certainty, and that unlike property and negotiable instruments law, you don't use such a guide. He said he was opposed to advisory opinions and advance clearances in merger situations; that he preferred to rely upon independent tribunals and letting the courts decide.

LEGISLATION

Proposed Legislation

H. R. 6404, introduced by Representative Celler, and referred to the Committee on the Judiciary, is an amendment to section 4 of the Clayton Act. It provides that amounts recovered in treble damage actions, in excess of actual damages, shall not be treated as taxable income. If enacted, the amendment would restore the treatment afforded such recoveries prior to the recent Supreme Court decision in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.,* 348 U. S. 426 (1955).

H. R. 6405, also introduced by Representative Celler, and referred to the Committee on Banking and Currency, is an amendment to the Federal Deposit Insurance Act. The bill would strike out the third sentence of that subsection and substitute the following: "No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a district bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a district bank), or (iii) of the corporation if the acquiring, assuming, or resulting bank is to be nonmember insured bank (except a district bank); and no non-insured bank shall merge or consolidate with any other noninsured bank, or either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other noninsured bank without the prior written consent of the Board of Governors of the Federal Reserve System. In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the factors enunmerated in section 6 of this Act and shall not grant consent under this subsection in the case of a merger, consolidation, acquisition of assets or assumption of liabilities, where in any section of the country, the effect thereof may be substantially to lessen competition, or to tend to create a monopoly."

The main effect of this amendment would appear to be only that of requiring advance clearance for bank mergers.

H. R. 6544, introduced by Representative Steed, and referred to the Committee on Interstate and Foreign Commerce, proposes an amendment to section 5 (a) of the Federal Trade Commission Act by adding new subsections (6) and (7). New subsection (6) would make it legal for a manufacturer to agree that his distributor shall have the sole and exclusive right to sell, in a specified geographical area, a commodity produced by the said manufacturer which is in free and open competition with commodities of the same general class produced or distrubuted by others. Subsection (7) would permit the manufacturer to require his distributor to agree to sell only within the designated area.

The Miller-Tydings Act and the McGuire Act permitted sellers to engage in vertical price fixing. Representative Steed's bill is designed to permit vertical market allocations. Since price fixing and market sharing are two aspects of the same phenomenon, the arguments for and against resale maintenance are applicable to this bill. It may be expected, however, that the device of vertical allocation of markets will not be workable for products such as dentifrices, liquor, etc., which are necessarily sold through many outlets. The bill seems primarily applicable to commodities merchandized through dealership systems similar to those employed by the automobile industry.

The bill, as it stands, contains numerous ambiguities. The words "his distributor" are undefined, but it would appear that the manufacturer could require such contracts from dealers who buy his product through an intermediary. Presumably, the permission given the manufacturer to require his distributor to agree would include forbidding other distributors to resell to a recalcitrant. The words "free and open competition with commodities of the same general class" have not yet been given any very precise meaning.

S. 2055, introduced by Senator Capehart and referred to the Committee on Interstate and Foreign Commerce, would amend section 5 (a) of the Federal Trade Commission Act so as to strengthen the amendment accomplished by the McGuire Act. Senator Capehart's bill, would make it an unfair method of competition for manu-

facturers or distributors of commodities subject to resale-price-maintenance, contracts to willfully and knowingly sell or deliver such commodities (A) to persons selling same at less than prices prescribed in such contracts or (B) to persons selling same to others who so sell. The proposed amendment provides for injunctive relief and actual damages to those injured thereby, the court having discretion to treble the damages.

The recent Report of the Attorney General's National Committee to Study the Antitrust Laws regarded the federal laws as to "Fair Trade" pricing as an "unwarranted compromise of the basic tenets of national antitrust policy," and recommended their repeal. In practice, the enforcement of resale price maintenance has largely broken down. Senator Capehart's bill is an attempt to strengthen enforcement procedures, and represents a philosophy opposed to that of the Attorney General's Committee.

S. 2075, introduced by Senator Sparkman, read twice and referred to the Committee on the Judiciary, would amend section 7 of the Clayton Act by adding a prohibition of bank mergers where the effect "may be substantially to lessen competition, or tend to create a monopoly, in commerce, in banking or banking service in any section of the country." It is not clear that this part of the bill would add anything to existing law. The bill goes on, however, to require that all mergers between corporations of any nature be reported to the Attorney General and the Federal Trade Commission at least ninety days prior to consummation of the merger if any party thereto has capital, surplus, and undivided profits aggregating more than $1,000,000. This bill contemplates the giving of advance notice rather than the seeking of permission, although in operation it would undoubtedly result in an informal clearance procedure for mergers and acquisitions. The failure of the Attorney General or the Federal Trade Commission to interpose an objection would not constitute a bar to later action.

DECISIONS

Lawlor v. *National Screen Service Corp.*, Supreme Court (June 6, 1955). Opinion by Warren, *C.J.*

The question presented was whether petitioners' action for treble damages was barred under the doctrine of res judicata. In 1942, together with others in the business of leasing advertising posters to motion picture exhibitors, petitioners had commenced a treble damage antitrust action against National Screen and three motion picture producers who had granted exclusive licenses to manufacture and distribute advertising material to National Screen. The suit was settled prior to trial, and pursuant to the settlement, the suit was dismissed "with prejudice" by court order. No findings of fact or law were made. In 1949, petitioners brought the instant action, again seeking treble damages and injunctive relief. Defendants were those in the 1942 suit plus five producers who had licensed National Screen subsequent to the dismissal. The District Court and the Court of Appeals for the Third Circuit upheld defendants' motion to dismiss on the theory of res judicata.

The Supreme Court said the fact that both suits involved "essentially the same course of wrongful conduct" was not decisive. The conduct complained of here was all subsequent to the earlier judgment, and new types of antitrust violations were alleged. Moreover, there had occurred a substantial change in the scope of defendants' alleged monopoly, five new producers having granted exclusive licenses to National Screen. Thus, whether defendants' conduct was regarded as a series of individual torts or as one continuing tort, the prior judgment was no bar. Nor did it matter that the prior suit had sought injunctive relief which, if granted, would have prevented the illegal acts now complained of. This result was buttressed by the public interest in "vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action."

ACTIVITIES

July 13, 1955 (morning), Practicing Law Institute, "Current Problems in Patent Law," to be held at the Sheraton-Astor Hotel, New York City. The entire patent law series takes place from July 11th through the 15th. The first part of the morning session will be devoted to the "Contributory Infringement and Misuse Doctrines." The speakers will be Giles Rich, Esq. and John Hoxie, Esq., both of New York City. The late morning session will highlight "Patent Interchanges" and Sigmund Timberg, Esq., of Washington, D. C., and W. Meridith Behrens, Esq., of the American Cyanamid Company will be the speakers.

The price for the antitrust session alone is $10.00, and the charge for the entire four day program including all luncheons and the Monday evening reception is $75.00.

August 9, 1955—House Counsel Institute, University of Wisconsin, Madison, Wisconsin. The meeting is entitled "Current Problems in Trade Regulation." The morning session will be opened by Milton Handler with "Recommendations of the Attorney General's Antitrust Committee—Their Significance to House Counsel." Mr. Handler is a Professor of Law at the Columbia University School of Law and is a member of the Attorney General's Antitrust Committee, and practices law in New York City. His speech will compare and describe the problems of house counsel under the present antitrust laws and under recommended changes. Following this speech, special consideration will be given to: "Reconciling Patent Practices with the Antitrust Laws": John C. Stedman, Professor of Law, University of Wisconsin Law School; "Current Problems of Merchandising in the Face of the Proportionately Equal Terms Requirements": Ralph E. Axley, General Counsel, Ray-O-Vac Company, Madison; "Exclusive Dealing Arrangements in Buyer-Seller Relationships": Reynolds C. Seitz, Dean, Marquette University Law School; The honorable Edward F. Howrey, Chairman, Federal Trade Commission, will open the afternoon session with "The Federal Trade Commission and Business." Again, an effort will be made to reach the specific problems of the registrants by

dividing into discussion groups, for consideration of: (1) Exclusive Dealings: Lucius P. Chase, General Counsel, Kohler Company, *presiding*; (2) Clearances for Acquisitions, Mergers and Consolidations: Joseph Dean, Attorney, Line Material Company, Milwaukee, *presiding*; (3) Trade Associations: Malcolm Whyte, Milwaukee, *presiding*.

August 22-24, 1955—Section of Antitrust Law at the American Bar Association annual meeting in Philadelphia. Competitive conditions and the Attorney General's Committee Report will be the major topics. At the Tuesday morning meeting, attention will be given to the first three chapters of the Report, with papers to be presented by Charles I. Thompson of Philadelphia, Goldthwaite H. Dorr and George Nebolsine of New York City, and Hubert Hickam of Indianapolis. At the luncheon that day, Thomas E. Sunderland of Chicago will review highlights of judicial, administrative and legislative antitrust activity during the year. The remaining chapters of the Report will be analyzed at the Wednesday session by Dean Edward H. Levi of the University of Chicago Law School, R. Dean Moorhead of Austin, A. D. H. Kaplan of Washington, D. C., and William B. Carman of Los Angeles. For reservations, write to the ABA headquarters in Chicago.

BOOK REVIEWS

ANTITRUST LAW, Symposium-1955, Commerce Clearing House, Inc., Chicago, Ill. Pp. 116. ($2.00.)

This book represents the proceedings of the Seventh Annual Meeting of the Section on Antitrust of the New York State Bar Association, held January 26, 1955, in New York City.

The symposium has been divided into three segments—part one, antitrust law progress; part two, corporate mergers under amended section 7 of the Clayton Act; and a part three, a commemoration of the 40th anniversary of the Federal Trade Commission.

Worthy of special note is the section on mergers. In this both Judge Stanley N. Barnes and Judge Edward F. Howrey outdo themselves in analysis of the merger problem. Robert W. Austin must also be mentioned, in that the address reprinted here is the one which suggested a clearer metheod of thinking through problems in this area. It was his idea that consideration of the problem be prefaced by a determination of the approach to be used.

BIBLIOGRAPHIA

Administration and Enforcement

Williams, M. C., "Antitrust Enforcement Procedures of the Department of Justice and the Federal Trade Commission," 28 Wis. B. Bull. 19, 54 (April, 1955).

Administrative Law

Bernstein, Marver, H., REGULATING BUSINESS BY INDEPENDENT COMMISSION, (Princeton University Press, Princeton, N. J.: 1955.) Pp. 306, $5.00.

Advertising Practices

Singer, B. E., "Cooperative Advertising Under the Robinson-Patman Act," 26 Penn. B. A. Q. 287 (April, 1955).

Attorney General's Report

Weil, Gilbert H., "How New Antitrust Study May Affect Marketing," Printer's Ink, p. 25 (June 3, 1955).

Basing Point System

Marengo, Louis, "The Basing Point Decisions and the Steel Industry," 45 Amer. Econ. Rev. 509 (May, 1955).

Concepts of Competition and Monopoly

Clark, J. M., "Competition: Static Models and Dynamic Aspects," 45 Amer. Econ. Rev. 450 (May, 1955).

Weintraub, Sidney, "Revised Doctrines of Competition," 45 Amer. Econ. Rev. 463 (May, 1955).

Fair Trade

Diamond, Sidney A., "Antitrust Problems of Fair Trading," 1 Antitrust Bull. 97 (May, 1955).

Mermey, Maurice, "Fair Trade: The Fundamental Issues," 1 Antitrust Bull. 125 (May, 1955).

Note: "The Dual Entrepreneur and Fair Trade," 50 Northwestern V. L. Rev. 78 (March-April, 1955).

Walker, G. S., "Protection of the Trade Mark Owners' Good Will as a Justification for Fair Trade," 10 Intra L. Rev. (N. Y. U.) (March, 1955).

Foreign Commerce

Sturm, H. P., "Webb-Pomerene Associations," 8 Western Pol. Q. 82 (March, 1955).

Insurance

Moser, H. S., "Competition and Insurance: Yesterday-Today-Tomorrow," 388 Ins. L. J.: 305 (May, 1955).

Interpretation

Turner, D. T., "The American Antitrust Laws," 18 Modern L. Rev. 244 (May, 1955).

Marketing Practices

Goodman, Walter, "Hard Nox at Your Friendly Gas Station," 132 New Republic 8 (June 13, 1955).

McKie, James W., "The Decline of Monopoly in the Metal Container Industry," 45 Amer. Econ. Rev. 499 (May, 1955).

Note: "Tying Agreements and Exclusive Dealing Arrangements Before the Courts and the FTC," 55 Col. L. Rev. 561 (April, 1955).

Mergers

Report on Corporate Mergers and Acquisitions, Federal Trade Commission (U. S. Government Printing Office, Washington, D. C., May, 1955: $.55) Pp. 210.

Monopoly

Hale and Hale, "Monopoly in Motion," 41 VA. L. Rev. 431 (May, 1955).

Restrictive Business Practices

Domke, Martin, "The United Nations Draft Convention on Restrictive Business Practices," 4 Intl. & Comp. L. Q. 129 (January, 1955).

Trade Marks

Steed, Jr. and Hunter, III, "Trade Mark Assignments and Restraints of Trade: The Maolaice Cream Case," 33 No. Car. L. Rev. 399 (April, 1955).

Vertical Integration

Whitney, Simon N., "Vertical Disintegration in the Motion Picture Industry," 45 Amer. Econ. Rev. 491 (May, 1955).

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